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No. 08-1069

Supreme Court, U.S.
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IN THE
Supreme Court of the United States

EARNESTINE O. BROWN,

Petitioner,

v.

CITY OF CHESTER REDEVELOPMENT AUTHORITY
(A/K/A REDEVELOPMENT AUTHORITY OF THE
CITY OF CHESTER),

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF PENNSYLVANIA

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

- I. Whether Petitioner has presented compelling evidence to grant the Petition, where the Petitioner failed to demonstrate that the Opinion of the Commonwealth Court of Pennsylvania is in conflict with a decision of this Honorable Court or that the Commonwealth Court decided an important federal question that has not been settled by this Court, and the Commonwealth Court determined that the Petitioner failed to preserve issues for appellate review because Petitioner failed to identify any specific evidentiary rulings of the Lower Court or provide any citations to the record to support Petitioner's arguments.

- II. Whether Petitioner has presented compelling evidence to grant the Petition, where the Respondent followed all applicable procedures under the Pennsylvania Eminent Domain Code to condemn property for an educational use as a redevelopment project in an area certified as blighted; where the acts of the Respondent did not violate Petitioner's due process and Fifth Amendment rights; and where Respondent's actions are consistent with decisions of the Pennsylvania Supreme Court, as well as this Honorable Court.

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INTRODUCTION

Petitioner has presented no "compelling reasons" for her Petition for a Writ of Certiorari to be granted. Petitioner has failed to demonstrate that the decisions of the Pennsylvania courts to uphold the Respondent's condemnation as part of a larger redevelopment plan and proposal to eliminate blight in the City of Chester, Pennsylvania are in conflict with a decision of this Court, or a federal Court of Appeals, or that the Pennsylvania courts decided an important federal question that has not been settled by this Court.

The record is clear that the Respondent Redevelopment Authority in this case followed all relevant provisions of the Pennsylvania Urban Redevelopment Law and Eminent Domain Code in condemning the Subject Property occupied by Petitioner. Petitioner/Condemnee, moreover, failed to produce evidence that the Respondent failed to comply with appropriate procedures, and failed to prove that the condemnation in question was the result of collusion, fraud, or for a solely or primarily private purpose. Similarly, Petitioner's Brief before the intermediate state appellate court failed to preserve issues for appellate review.

Accordingly, the Petition for Writ of Certiorari should be denied.

STATEMENT OF THE CASE

This case involves a condemnation of real property located at 405 Madison Street in the City of Chester, Delaware County, Pennsylvania (the "Subject Property"). Respondent is the Redevelopment Authority of the City of Chester ("Redevelopment Authority" or "Respondent"), which is an authority organized and operated subject to the Pennsylvania Urban Redevelopment Law, 35 P.S. § 1701 *et seq.* The Petitioner/Condemnee is Earnestine Brown ("Brown" or "Petitioner"), an adult individual, who resides at the Subject Property.¹ While *pro se*, Brown was once a practicing attorney (See Trial Ct. Trans. at 47; R.R. at 170a). Under the Pennsylvania Urban Redevelopment Law (the "Redevelopment Law") the public purpose of a Redevelopment Authority is the elimination of blight through the redevelopment process. 35 P.S. Section 1702.

The Subject Property is located within the South East Central Business District redevelopment area, an area determined to be "blighted" under the Redevelopment Law based upon a study known as the "Redevelopment Area Plan for South East Central Business District Redevelopment Area # 1" (hereinafter the "Redevelopment Plan"), which was completed by the

¹ Contrary to Petitioner's assertion that she acquired title to the Subject property in 2003, (Pet. at 2), Condemnee acquired title to the Subject Property by virtue of a Deed dated March 14, 2002 and recorded November 1, 2004 in the Delaware County, Pennsylvania, Recorder of Deeds Office in Volume 3331, Page 1578.

City of Chester Planning Commission (the "Planning Commission") in March of 2004. (R.R. at 34a-46a)². The area certified as "blighted" encompassed numerous properties (R.R. at 47a). Within its boundaries, the Redevelopment Plan includes portions of both Chester City's Central Business District (CBD) Zoning district and C-2 Commercial Zoning District (the "Redevelopment Area") (R.R. at 45a). The Subject Property, however, is completely within boundaries of the Redevelopment Plan as prepared and adopted in 2004 (R.R. at 44-46; *See also* Trial Ct. Trans. at 125)³. The Planning Commission subsequently certified its determination of "blight" by Resolution adopted on April 14, 2004 (R.R. at 47a). No person or entity, including Condemnee, appealed from or otherwise challenged the determination of "blight." By Resolution adopted on August 11, 2004, the Redevelopment Plan was amended to specify "Educational institutional buildings and related facilities" as an enumerated use of property within the Redevelopment Area # 1. (R.R. at 50a.)

² Respondent disputes Petitioner's description of the redevelopment process and the negotiation, approval, and execution of the Redevelopment Agreement in question (Petition at 2-4) as lacking evidentiary support in the record. Petitioner never challenged the blight determination using the means available under Pennsylvania law.

³ Respondent disputes Petitioner's characterization of the zoning and use of the Subject Property (Pet. at 2-4). Contrary to Petitioner's unsupported assertions (Pet. at 4), Respondent never commissioned a preliminary appraisal allegedly rating the property as "Historic" or having a replacement value of \$795,000.00.

Subsequent to the Planning Commission's preparation and adoption of the Redevelopment Plan, the Redevelopment Authority prepared a redevelopment proposal, which was entitled "Redevelopment Plan Proposal for South East Central Business District Redevelopment Area # 1" (hereinafter the "Redevelopment Proposal"). (R.R. at 9a-19a.) The Redevelopment Plan Proposal was first adopted by resolution dated June 30, 2004 and was subsequently amended by resolution adopted on August 11, 2004. (R.R. at 52a-52a.) The Redevelopment Authority amended the Redevelopment Plan Proposal to include redevelopment of property within Redevelopment Area # 1 for "educational institutional buildings" and accessory uses thereto. (R.R. at 52a-52a.)

After the Planning Commission's determined the Redevelopment Area to be "blighted" and during the course of compiling its Redevelopment Proposal, the Respondent identified the Subject Property for potential acquisition "as part of the process to help redevelop that portion of the Southeast Central Business District" and for use in expanding the existing Chester Community Charter School located adjacent to the Subject Property. (Trial Ct. Trans. at 164-65; R.R. at 278a-288a). Under Pennsylvania law, a "charter school" is an independent *public* school operated under a charter from the local board of school directors. 24 P.S. § 17-1703-A. Additionally, charter Schools are public in nature in that they are (a) prohibited from unlawfully discriminating in admissions, hiring or operation; (b) required to be non-sectarian in all operations; and (c) prohibited from providing religious instruction. See 24 P.S. § 17-1715-A, subsections (3)-(5).

Thus, the requirement of a public use for the condemned property is clearly satisfied.

Respondent drafted a contingent Redevelopment Agreement for the redevelopment of the Subject Property for educational charter school purposes. The Redevelopment Agreement was accepted by Mr. Vahan Gureghian, a private developer, contingent upon Chester City Council approval of a redevelopment proposal⁴. (R.R. at 57a-123a.) In fact, the Executive Director of the Redevelopment Authority was only authorized to execute the Redevelopment Agreement upon Chester City Council's approval of the Redevelopment Proposal, as amended, and the Redevelopment Agreement. (R.R. at 53a.)

In September 2004, the Planning Commission reviewed the amendments to the Redevelopment Plan, Redevelopment Proposal, and Redevelopment Agreement and approved the submission of all three to the Chester City Council for Council's review. (R.R. at 54a.) On December 20, 2004, the Chester City Council held a public hearing on the proposed Redevelopment Plan, Redevelopment Proposal, and the Redevelopment Agreement—with notice thereof provided through publication in local newspapers on November 26, 2004, December 3, 2004, and December 6, 2004. (See R.R. at 55a.) The Chester City Council, thereafter, approved the Redevelopment Plan, Redevelopment Proposal, and

⁴ There is no support in the record for Petitioner's suggestion (Pet. at 3-4) that Mr. Gureghian individually holds the charter to the school. To the contrary, a non-profit entity holds the charter to the charter school.

Redevelopment Agreement by Resolution passed on February 9, 2005. (R.R. at 55a-56a.)

The contingent Redevelopment Agreement was not executed until *July 6, 2005*, after it had been approved by the Planning Commission and City Council and as required by the Urban Development Law. By resolution adopted on July 6, 2005, the Respondent's Board of Directors authorized its solicitors to file a Declaration of Taking to acquire title to the Subject Property. On July 14, 2005, a Declaration of Taking⁵ was filed in the Delaware County Office of Judicial Support (OJS). (R.R. at 1a.) On August 15, 2005, Condemnee filed timely preliminary objections to the Declaration of Taking.⁶ (R.R. at 22a-27a.) Under Pennsylvania law, preliminary objections in the context of eminent domain actions serve a different purpose than preliminary objections filed in other civil actions...in eminent domain cases, preliminary objections are intended as a procedure to resolve expeditiously the factual and legal challenges to a declaration of taking before the parties proceed to determine damages. *Condemnation by Borough of Hanover of Land*, 950 A.2d 373, 382 (Pa.Cmwlt. 2008).

⁵ Respondent filed the Declaration of Taking pursuant to authority granted by the Pennsylvania Eminent Domain Code, Act of June 22, 1964, Special Sess., P.L. 84, *as amended*, 26 P.S. §1-101 — §1-901, and Section 9 of the Urban Redevelopment Law, Act of May 24, 1945, P.L. 991, *as amended*, 35 P.S. 1709.

⁶ Under Pennsylvania law, While Petitioner "summarized" her Preliminary Objections claiming she included an objection to the Planning Commission's blight certification (Petitioner's Lower Court Br. at 6), a review of her actual Preliminary Objections reveals that Petitioner made no such challenge to the blight certification (R.R. at 22a-27a).

After conducting an evidentiary hearing and following the submission of Memoranda of Law, the Court of Common Pleas of Delaware County overruled Petitioner's Preliminary Objections by Order dated December 13, 2006. (Pet. App. at 29) On January 30, 2007, Petitioner served her Statement of Matters Complained of on Appeal upon the Honorable Kenneth A. Clouse of the Delaware County, Pennsylvania Court of Common Pleas (the "Trial Court"). As required by Pennsylvania Rule of Appellate Procedure 1925(a), Judge Clouse issued the Trial Court's Opinion on March 8, 2007, upholding the condemnation in question and overruling the Preliminary Objections filed by Petitioner.

The Trial Court's Opinion reasoned that Petitioner, *inter alia*: (1) failed to substantiate any allegation that the "Redevelopment Authority or any else connected with the taking acted fraudulently or in bad faith" (Pet. App. at 32); (2) failed to raise any challenge in her Preliminary Objections to the Subject Property's blight certification (Pet. App. at 32, 46); and (3) failed to present any facts to substantiate her contention that the Subject Property was condemned for an impermissible private purpose. In addition, the Trial Court reasoned that the United States Supreme Court's decision in *Kelo v. City of New London*, 545 U.S. 469 (2005), did not represent "a departure from, or a significant expansion of, eminent domain law in Pennsylvania." (Pet. App. at 52) The Trial Court cited multiple Pennsylvania appellate decisions that "upheld numerous condemnations under the Urban Redevelopment Law in which the exercise of eminent was challenged on the grounds that condemnation involved private benefit." (Pet. App. at 38). In regards to U.S. Supreme Court precedent, the Trial Court found

Berman v. Parker, 348 U.S. 26 (1954), which “upheld a proposed redevelopment plan targeting a non-blighted building located in a blighted area of Washington D.C.,” to be most persuasive. (Pet. App. at 36) The Petitioner then appealed the Trial Court’s decision⁷.

Sitting *en banc*, the Pennsylvania Commonwealth Court, at Commonwealth Court Docket 651 CD 2007, affirmed the Trial Court’s order to overrule the Preliminary Objections in a 5-2 decision.⁸ The Commonwealth Court reasoned that Petitioner had waived all issues before it by not providing either citations or references to any particular evidentiary rulings that the Trial Court supposedly made in error. As explained by the Commonwealth Court, “[Petitioner] merely lists her witnesses” but provided no explanation as to what relevant evidence was excluded or how any excluded testimony would have been relevant. (Pet. App. at 7)

Petitioner then appealed to the Pennsylvania Supreme Court, which denied her Petition for Allowance of Appeal (Pennsylvania Supreme Court Docket No. 341

⁷ Petitioner originally appealed to the Superior Court of Pennsylvania, which subsequently granted Respondent’s application to transfer the appeal to the Commonwealth Court of Pennsylvania, the intermediate appellate state court having the appropriate jurisdiction over the Petitioner’s appeal. (R.R. at 35a.)

⁸ This case was listed before an *en banc* panel of the entire membership of the Commonwealth Court after being briefed and argued before a three-member panel, which had not issued a decision.

MAL 2008) by Order dated November 17, 2008. Petitioner also filed an Application for Stay with the Pennsylvania Supreme Court, which denied said application by Order dated March 11, 2009. Additionally, Petitioner filed a Petition for Writ of Certiorari with the U.S. Supreme Court on February 17, 2009. For the reasons set forth herein, Respondent requests that the Petition for Writ be denied.

REASONS FOR DENYING THE PETITION

Substantively, the decisions below by Pennsylvania's courts do not conflict with a decision of this Court or any federal Court of Appeals, nor do they implicate a federal question that has not been decided by this Court. The state court decisions in question, involving the Respondent's use of eminent domain powers to eliminate blight through the redevelopment process in this matter, are in accord with this Honorable Court's decisions in *Kelo v. City of New London*, 545 U.S. 469 (2005) and *Berman v. Parker*, 348 U.S. 26 (1954). Accordingly, Petitioner has not carried her burden of demonstrating any "compelling reasons" for the Petition to be granted, *See* Sup. Ct. R. 10, and the Petition should be denied.

I. *Petitioner failed to demonstrate that the Commonwealth Court of Pennsylvania, by ruling that Petitioner failed to preserve issues for appellate review where Petitioner failed to identify any specific evidentiary rulings of the Trial Court or provide any citations to the record to support Petitioner's arguments, acted in conflict with a decision of this Honorable Court or decided an important federal question that has not been settled by this Court.*

A. *Petitioner failed to establish an evidentiary record for Petitioner's arguments or preserve them for appellate review.*

Petitioner argues in her Petition for Writ of Certiorari that her Brief to the Commonwealth Court of Pennsylvania was not so deficient as to prohibit meaningful appellate review, essentially because the dissent found the record sufficient enough to craft an opinion. The Majority of the intermediate state appellate court, the Commonwealth Court of Pennsylvania, rejected all issues raised by Condemnee with the following reasoning: "Absent proffered testimony to review or properly developed arguments to consider, we are unable to perform appellate review of the trial court rulings." (Pet. App. at 10) Petitioner baldly states that she "duly preserved the forestated [sic] issues and deprivation of her due process and Fifth Amendment rights", yet the evidence of record at the Trial Court, and the Majority Opinion of the Commonwealth Court, demonstrate that the opposite is true.

Pennsylvania law regarding the subject of waiver in the context of appellate review is well-established and supports the Commonwealth Court's decision. As recently addressed by the Pennsylvania Superior Court (Pennsylvania's other intermediate appellate court):

When briefing the various issues that have been preserved, it is an appellant's duty to present arguments that are sufficiently developed for our review. *Commonwealth v. Gould*, 912 A.2d 869, 873 (Pa. Super. 2006). **The brief must support the claims with pertinent discussion, with references to the record and with citations to legal authorities.** *Id.*; Pa.R.A.P. 2119(a), (b), (c). Citations to authorities must articulate the principles for which they are cited. Pa.R.A.P. 2119(b).

¶ 11 This Court will not act as counsel and will not develop arguments on behalf of an appellant. *Gould*, 912 A.2d at 873. Moreover, when defects in a brief **impede our ability to conduct meaningful appellate review**, we may dismiss the appeal entirely or find certain issues to be waived. *Id.*; Pa.R.A.P. 2101.

Commonwealth v. Hardy, 918 A.2d 766, 771 (Pa. Super. 2007) (emphasis added); see also, *Kochan v. Commonwealth Dept. of Transp., Bureau of Driver Licensing*, 768 A.2d 1186 (Pa. Cmwlth. 2001). These same requirements are applicable under federal law. See *Simmons v. City of Philadelphia*, 947 F.2d 1042, 1065

(3rd Cir. 1991). Under Federal Rules of Appellate Procedure 28(a)(3) and (5), appellants are required to set forth the issues raised on appeal and to present an argument in support of those issues in their opening brief. It is "well-settled" that if an appellant fails to comply with these requirements on a particular issue, the appellant normally has abandoned and waived that issue on appeal. . ." *Kost v. Kozakiewicz*, 1 F.3d 176, 182 (3rd Cir. 1993).

Foremost, it is reiterated that Petitioner *still does not specify* what particular objections the Trial judge erred in sustaining or rejecting nor provide any citation to the record. As explained by the Majority Opinion of the Commonwealth Court, a citation by Petitioner to "pages 6-124" of the hearing transcript does not constitute a "specific reference" to the places in the record where the rulings or exceptions appear. (See Pet. App. At 8). The Majority Opinion also noted that Petitioner quoted the Trial Court Judge's statement that "I haven't heard a single relevant fact from this . . . witness, yet, in an hour" but never explained to the Commonwealth Court why this statement was incorrect. (See Pet. App. At 8 (citing R.R. at 167a)). It is respectfully submitted that the Commonwealth Court properly exercised its discretion in holding that Petitioner's failure to properly brief her arguments concerning the Trial Court's alleged evidentiary errors frustrated proper appellate review and constituted the waiver of her issues.

Because Condemnee failed (and still fails) to specify what objections she feels were improperly ruled upon,

the Commonwealth Court did not err in reasoning that it was precluded from conducting meaningful appellate review.

B. Condemnee Was Not Denied The Opportunity To Present Evidence On The Purpose Of The Taking Of Her Property

Petitioner focuses much of her Petition for Writ of Certiorari on the unsupported assertion that she was denied an opportunity to present witnesses and arguments before the Trial Court, which, according to Petitioner, "[u]nfortunately but predictably" overruled her Preliminary Objections (Pet. at 14). A review of the transcript of the hearing on her Preliminary Objections, however, clearly establishes the fallacy in Petitioner's assertions. A review of the one hundred ninety page (190) transcript of the hearing on the Preliminary Objections reveals that Judge Clouse afforded Condemnee wide latitude to present any evidence tending to establish or allow for an inference that the condemnation of the Subject Property was for a "private purpose" or achieved through or for improper purposes. (See R.R. at 124a-314a).

In general, an appellate court will not disturb a lower court's ruling on evidentiary issues unless the trial court manifestly abused its discretion or committed an error of law that affected the outcome of the case. *In re: Redevelopment Authority of City of Harrisburg*, 386 A.2d 1052, 1055 (Pa.Cmwlth. 1978). "Stated differently, the reviewing court's inquiry is to determine whether the court below acted capriciously or palpably or grossly abused its discretion." *Id.*

During the course of the hearing, Condemnee presented and examined four witness: counsel for Mr. Gureghian, George Cordes, Esquire (R.R. at 131a); the Mayor of the City of Chester, Wendell Butler (R.R. at 173a); the proposed redeveloper of the Subject Property after its condemnation, Mr. Gureghian (R.R. at 201a); the City Planner for the City of Chester, William C. Payne (R.R. at 227a); and, the Chairman of the Redevelopment Authority, Randolph Dixon (R.R. at 263a). The Redevelopment Authority, at the close of Condemnee's case, presented the testimony of the Executive Director of the Redevelopment Authority, David Sciocchetti. (R.R. at 277a). Condemnee, moreover, engaged in an extended cross-examination of Mr. Sciocchetti. The record is clear that Condemnee was afforded the opportunity to present any witness and relevant arguments she so desired.

Throughout the hearing (and in response to almost all of the Respondent Redevelopment Authority's objections), Judge Clouse attempted to refocus the hearing on the issues raised in Petitioner's Preliminary Objections (*See, e.g.*, Trial Ct. Trans at 38, 48, 56, 59, 64, 67, 86, 92, 100, 118, 128.; R.R. at 161a, 171a, 179a, 182a, 18a, 190a, 209a, 215a, 223a, 241a, 251a). After Petitioner stated to the Court, "I want to put on record that this property has not been condemned for legitimate public purpose", Judge Clouse responded:

Okay, but then you have to prove that, okay?
And I haven't heard a single thing from that stand, yet, that establishes that. In fact, quite the contrary. The fact that you state it doesn't make it true. You have to prove this.

(Trial Ct. Trans. at 86; R.R. at 209a.) Thus, a review of the transcript reveals the Judge Clouse afforded Condemnee wide latitude in presenting her case and, where necessary, made proper rulings to limit the introduction of patently irrelevant evidence.

C. The Decision Of The Trial Court Is In Accord With U.S. Supreme Court Precedent, as well as Pennsylvania Supreme Court Precedent Interpreting *Kelo v. City Of New London*, 545 U.S. 469 (2005)

In *Berman v. Parker*, 348 U.S. 26 (1954), the U.S. Supreme Court upheld a proposed redevelopment plan targeting a **blighted** area of Washington, D.C., in which most of the housing for the area's inhabitants was beyond repair. Under the plan, the area would be condemned and part of it used for the construction of streets, schools, and other public facilities. The rest would be leased or sold to private parties for the purposes of redevelopment, including the construction of affordable housing. The owner of a store in the area challenged the condemnation, arguing that his store was not itself blighted. The U.S. Supreme Court unanimously upheld the condemnation, deferring to the legislative and agency judgment that the area "must be planned as a whole" for the redevelopment plan to be successful.

Relying upon its prior decisions in *Berman, supra*, and *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984) (upholding a Hawaiian statute intended to remediate an oligopoly in land as the result of market failure, whereby fee title was taken from lessors and

transferred to lessees, subject to payment of just compensation)⁹, the Supreme Court in *Kelo* explicitly stated for the first time that “economic development” is a valid public purpose under the Fifth Amendment to the U.S. Constitution. As the *Kelo* Court stated:

“Promoting economic development is a traditional and long accepted function of government. There is, moreover, no principled way of distinguishing economic development from the other public purposes that we have recognized. . .”

After enumerating various precedents in which the Court upheld takings that (a) facilitated agriculture and mining; (b) **remediated blight**; (c) broke up a land oligopoly; and (d) reduced barriers to entry in the pesticide market, the *Kelo* Court stated:

“Clearly, there is no basis for exempting economic development from our traditionally broad understanding of public purposes.”

Unlike the area in *Kelo*, which was designated as economically distressed but was not “blighted”, the area of the Subject Property in this case *was* declared blighted by the City of Chester Planning Commission.

⁹ In *Midkiff*, the Supreme Court stated in part, “the ‘public use’ requirement is . . . coterminous with the scope of a sovereign’s police powers,” *Midkiff*, 467 U.S. at 240, 104 S.Ct. 2321, and therefore is satisfied “where the exercise of the eminent domain power is rationally related to a conceivable public purpose”, *Id.* at 241, 104 S.Ct. 2321.

If one wishes to consider precedent from the U.S. Supreme Court, the more appropriate case is *Berman, supra*. The *Berman* case has been cited with approval by Pennsylvania's appellate courts. See e.g., *Harford Twp. v. Bandurick*, 660 A.2d 189, 191 (Pa.Cmwlt. 1995), *appeal denied*, 666 A.2d 1058 (Pa. 1995); *In re Marivitz*, 161 Pa.Cmwlt. 247, 636 A.2d 1241, 1244 (Pa.Cmwlt. 1994); *S. O. L. Club, Inc. v. City of Williamsport*, 65 Pa.Cmwlt. 351, 443 A.2d 410, 411 (Pa.Cmwlt. 1982).

In December 2007, the Pennsylvania Supreme Court issued two separate decisions that incorporated and analyzed the *Kelo* decision—i.e., *In re Condemnation Proceeding by the Redevelopment Authority of Philadelphia (1839 N. Eighth St.)*, __ Pa. __, 938 A.2d 341 (2007) (hereinafter “*Appeal of Mary Smith*”) and *Middletown Twp. v. Lands of Stone*, __ Pa. __, 939 A.2d 331 (2007) (hereinafter “*Lands of Stone*”). A reading of both decisions confirms the propriety of taking private property under *Kelo* and relevant provisions of the Pennsylvania Urban Redevelopment Law.¹⁰ It is clear that transferring condemned property to another private party for a redevelopment project is entirely permissible, so long as that second party utilizes the condemned property for a “public purpose.”

In *Appeal of Mary Smith*, the Pennsylvania Supreme Court held that the Redevelopment Authority of Philadelphia acted in accordance with the authority granted to it by the *Urban Redevelopment Law* when—

¹⁰ Act of May 24, 2946, P.L. 991, as amended, 35 P.S. §§ 1701-1719.2.

upon another private entity's request—it condemned private property located within a Redevelopment Area. After it condemned the property, the Redevelopment Authority of Philadelphia sought to transfer the condemned property to the very same private entity who requested its condemnation for use as a “non-denominational, faith-based, not tuition based school for children of the blighted neighborhood. . . .”

Like the issue of “taking for a private purpose” raised in the instant Petition for Writ of Certiorari, the Pennsylvania Supreme Court in *Appeal of Mary Smith* was tasked to address the propriety of taking private property, located within a redevelopment area designated as blighted, and then transferring said property to a private entity for redevelopment as a school. In addressing its propriety, the Pennsylvania Supreme Court quoted Justice Kennedy’s instruction in *Kelo* that:

[a] court confronted with a plausible accusation of impermissible favoritism to private parties should treat the objection as a serious one and review the record to see if it has merit, though with the presumption that the government’s actions were reasonable and intended to serve a public purpose.

Kelo at 491 (Kennedy, J. concurring). Ultimately, the Pennsylvania Supreme Court in *Appeal of Mary Smith* ruled that the redevelopment scheme under review was proper and legal.

In holding that such a transfer was proper and in accordance with the authority granted to redevelopment authorities by the Urban Redevelopment Law, the Pennsylvania Supreme Court looked to the reasoning of Judge Pellegrini in his dissent to *Condemnation Proceeding by the Redevelopment Authority of Philadelphia (1839 N. Eighth St.)*, 981 A.2d 820 (Pa. Cmwlth. 2006). The Pennsylvania Supreme Court noted that Judge Pellegrini, relying on *Belovsky v. Redevelopment Authority*, 357 Pa. 329, 54 A.2d 277 (1947), reasoned that elimination of blight is the valid public purpose of a condemnation pursuant to the Urban Redevelopment Law, and courts should not expand their inquiry into the ultimate use or user of the redeveloped property. After recognizing the reasoning employed in Judge Pellegrini's dissent, the Pennsylvania Supreme Court held that, as in the instant appeal, a taking for subsequent transfer to a private entity to operate a school is permissible so long as "the statutory procedures were followed, i.e., there was a plan, a public hearing, and approval by City Counsel." *Appeal of Mary Smith* at __, __ A.2d at __. The Pennsylvania Supreme Court reasoned that because the property was acquired pursuant to a redevelopment plan and for the valid public purpose of eliminating blight, the ultimate use or user of the property was of no consequence so long as there was no evidence of bad-faith on the part of the Redevelopment Authority.

Here, Petitioner argues that the Pennsylvania courts' decisions to uphold the taking constitute an "egregious abuse of discretion and deprivation of Petitioner's fundamental due process and Fifth Amendment rights" (Pet. at 14-15). The Pennsylvania

Supreme Court's decision in *Appeal of Mary Smith*, however, makes clear the propriety and legality of the procedures used by a redevelopment authority for the redevelopment of a blighted area. While Respondent makes/made various assertions as to improper motives and collusion, she failed, after ample opportunity, to substantiate any of those claims before the Trial Court. To the contrary, the record in this case substantiates that Respondent followed and acted pursuant to the Urban Redevelopment Law and the Eminent Domain Code when it submitted its Redevelopment Proposal and Proposed Redevelopment Agreement for approval and, after obtaining the City's approval, condemned the Subject Property for the elimination of blight and urban redevelopment.

In *Lands of Stone*, the Pennsylvania Supreme Court considered *Kelo* in its analysis of whether the taking of private land for "recreation" was the actual "public purpose" for the taking in that case. While the Court ultimately found the "recreation" was not the true purpose of the condemnation, the Court's consideration of *Kelo* is instructive to the instant case. In addressing whether recreation was the true purpose of the taking, the Pennsylvania Supreme Court reasoned that "evidence of a well-developed plan of proper scope is significant proof that an authorized purpose truly motivates a taking." *Lands of Stone*, at __.

Here, the record is clear that the Redevelopment Authority, City Planning Commission, and City Council followed the appropriate statutory procedures, which included evaluation and certification of the "blighted" conditions by the Planning Commission, preparation of

a Redevelopment Area Plan, submission of a Redevelopment Area Proposal, all of which resulted in a Redevelopment Agreement approved by the City Council of the City of Chester. The condemnation was made pursuant to a "carefully considered" redevelopment plan" for urban renewal purposes and the elimination of blight.

II. *Petitioner failed to demonstrate compelling evidence to grant the Petition for Writ of Certiorari, where the record demonstrates that Respondent, as required by the Pennsylvania Urban Redevelopment Law and the Pennsylvania Eminent Domain Code followed all applicable procedures to condemn property for an educational use as part of redevelopment project in an area certified as blighted, and did not infringe upon Petitioner's due process and Fifth Amendment rights.*

The "procedural framework" for redevelopment under the Pennsylvania Urban Redevelopment Law was concisely stated by the Pennsylvania Supreme Court as follows:

The local planning commission makes a "redevelopment area plan" designating an area which it finds to be blighted because of the existence of the conditions enumerated in the act and containing recommendations for the redevelopment of such area. The plan must set forth the boundaries of the area, information concerning its buildings and population, a statement of the existing uses

of the real property therein, a statement of the proposed uses following redevelopment, a statement of the proposed changes in zoning ordinances and street layouts, an estimate of the cost of acquisition of the area and other costs necessary to prepare it for redevelopment, and a statement of such continuing controls as may be deemed necessary to accomplish the purposes of the act. Thereupon the Authority prepares a "redevelopment proposal" for the redevelopment of all or part of such area, including the proposed redevelopment contract and the selection of the redeveloper, and submits this proposal to the planning commission for review. The proposal, together with the planning commission's recommendations thereon, are then certified to the governing body, which, after a public hearing, approves or rejects the proposal and the redevelopment contract; in the event of the proposal being approved the Authority is empowered to execute the contract and to take such action as may be necessary to carry it out. The contract provides for the amount of the consideration to be paid by the redeveloper to the Authority and for the necessary continuing controls.

Belovsky v. Redevelopment Authority of Philadelphia, 357 Pa. 329, 335-36, 54 A.2d 277, 280-81 (1947). See also *In re Redevelopment Authority of City of Philadelphia*, 891 A.2d 820, 827 (Pa.Cmwlt. 2006)

Here, the record established before the Trial Court makes clear that the condemnation in question was undertaken pursuant to a Redevelopment Area Plan and Proposal approved by the City of Chester Planning Commission, Redevelopment Authority, and City Council, making it the type of "carefully considered development plan" which was described by Justice Kennedy in *Kelo*. The record is also clear that the Redevelopment Authority followed the appropriate statutory procedures, which included certification of the "blighted" conditions, preparation of a Redevelopment Area Plan, preparation of a Redevelopment Area Proposal, drafting of a Redevelopment Contract, and approval by the governing body. A federal court should "not substitute its judgment for a legislature's judgment as to what constitutes a public use 'unless the use be palpably without reasonable foundation.'" *Midkiff, supra* (quoting *United States v. Gettysburg Elec. Ry. Co.*, 160 U.S. 668, 680, 16 S.Ct. 427 (1896)). The decisions of the Pennsylvania courts to uphold the condemnation in question are well-supported by the record, applicable state and federal precedent, and should be respected by this Honorable Court, which should decline acceptance of the Petition for Writ of Certiorari.

CONCLUSION

Acceptance of this case for review by the U.S. Supreme Court will not provide any greater protection of the due process rights of condemnees; such a decision will only reward Petitioner's efforts to prolong this litigation for the purpose of delay, allowing her to continue to reside at the tax-delinquent Subject Property to the great detriment of the public. It would

adversely impact the Redevelopment Authority's ability to carry out a duly approved Redevelopment Plan to redevelop an area, which was legislatively determined to be blighted, for expansion of a public charter school. Petitioner claims that she has been "grievously harmed" (Pet. at 16) by the decisions of the Pennsylvania courts below, without articulating how the decisions below are unsupported by the evidence or record or contradicted by applicable law. Petitioner finds "the procedures employed to effectuate the taking so abusive" (Pet. at 19), yet fails to demonstrate by evidence of record or as a matter of law how the Respondent's exercise of eminent domain powers to eliminate blight, in an area designated as blighted, through the same type of redevelopment process as was upheld in *Berman*, violates her due process rights.

Petitioner has not established any compelling reasons for this Honorable Court to grant the Petition for Certiorari. Therefore, Respondent respectfully request that the Petition be denied.

Respectfully submitted,

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